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Supreme Court, U.S.
FILED

No. 07-1147

DEC 26 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JUAN PEQUENO,

Petitioner,

v.

MICHAEL SCHMIDT, Ch7 Trustee ,

Respondent.

Petition For A Writ Of Certiorari To Review
The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This litigation involves the same parties and derives from the same bankruptcy cause #01-24255. The earlier bankruptcy appellate ruled in Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004), that because Pequeno had been granted Ch13 conversion from a previous Ch7, prior to Ch7 Trustee Schmidt's conditional settlement, it was 'Pequeno who was authorized to settle Pequeno's Judgment, and not Trustee Schmidt,' thus rendering moot the alleged conditional settlement of September 25, 2002.

Bankruptcy Court's recent ruling of September 26, 2005 to deny Pequeno's motion to null and void Trustee Schmidt's conditional settlement of September 25, 2002, is in conflict with the 'law of the case doctrine' decisions in the U. S. Supreme Court and with other Federal Courts since same ruling had been decided by superior Bankruptcy Appellate Court in Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004).

The Bankruptcy Appellate Panel for the 5th Circuit affirmed the decision of the Bankruptcy court for the Southern District of Brownsville and is in conflict with the 'law of the case doctrine' decisions in the U. S. Supreme Court and with other Federal Courts since same ruling had been decided by superior Bankruptcy Appellate Court in Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004).

The 5th Circuit Court of Appeals ruled to dismiss Petitioner's appeal on basis of moot doctrine eventhough the 'law of the case doctrine' bars

Trustee Schmidt from using a conditional settlement Order of September 25, 2002 which had been rendered 'ineffective' and moot on an earlier appeal before the Bankruptcy Appellate court and affirmed before the 5th Circuit Court of appeals, and is in conflict with the 'law of the case doctrine' decisions in the U. S. Supreme Court and with other Federal Courts.

The question presented therefore is, once issues have been decided by U. S. Federal superior appellate courts in earlier appeals involving same parties and deriving from same bankruptcy case and become 'the law of the case', can 'the law of case' be denied by the 5th Circuit Court of Appeals, in conflict with decisions of U. S. Supreme Court and other Federal Circuit Court of Appeals.

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OPINION BELOW

The order denying Petitioner's request for Rehearing En Banc by the 5th Circuit of Appeal is docketed in appeal #07-40113, filed on September 25, 2007. The opinion by the Fifth Circuit Court of Appeals is also docketed in same appeal filed on August 28, 2007. The decision of the United States District Appellate Court for the Southern District of Texas is reported in civil cause #05-cv0271. The decision by the Bankruptcy Court for the Southern District of Texas is reported in civil cause#01-24255.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on August 28, 2007. Petitioner filed a timely request for rehearing. The petition for rehearing en banc was denied by order dated September 25, 2007.

CONSTITUTIONAL PROVISIONS AND STATUTES

The doctrine of 'law of the case' is a rule of practice under which a rule of law enunciated by a federal court 'not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but [also] establishes the law which other courts owing obedience to it must, and which it itself will,

normally, apply to the same issues in subsequent proceedings in the same case. 1B Moore's Federal Practice 1290 para. 0.404[1] (2d ed. 1974). The doctrine is 'based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter.' United States v. United States

Smelting Refining & Mining Co., 339 U.S. 186, 198, 70 S. Ct. 537, 544, 94 L. Ed. 750 (1950); Fontainebleau Hotel Corp. v. Crossman, 286 F.2d 926, 928 (5th Cir. 1961). The leading and controlling 5th Circuit case on the doctrine is White v. Murtha, 377 F.2d 428 (5th Cir. 1967) in which the Court said:

"While the 'law of the case' doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a latter appeal in the appellate court, unless [1] the evidence on a subsequent trail was substantially different, [2] controlling authority has since made a contrary decision of the law applicable to such issues, or [3] the decision was clearly erroneous and would work manifest injustice."

STATEMENT OF THE CASE

A. Factual Background.

Pequeno's Bankruptcy case has been on-going since December 31, 2001, cause#01-24255 and is intertwined with Pequeno's 1st Amendment Lawsuit against former employer, City of Brownsville in which Pequeno won a monetary Judgment of $400,000, cause #B-cv-00180.

Pequeno originally filed Ch7 Bankruptcy to save his homestead of 20 years with over $30,000 in equity prior to winning Title 42 U.S.C. §1983 employment lawsuit. Pequeno was informed by Bankruptcy Court that in order to save his homestead that Pequeno needed to convert to a Ch13.

On July 17, 2002, Pequeno filed motion to convert pursuant to Title 11 U.S.C. § 706(a). On August 7, 2002 hearing the Bankruptcy Court granted Pequeno's Ch13 conversion. But then, based on Ch7 Trustee Michael Schmidt's false accusations that Pequeno was converting in 'bad faith', Bankruptcy Court changed its mind of its August 7, 2002 decision to convert Pequeno to Ch13.

Pequeno, however, appealed this Order of Court changing its mind of August 7, 2002 decision, in Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex 2004) in District Appellate Court, and Pequeno also appealed the conditional settlement of September 25, 2002 because Ch7 Trustee Schmidt had no standing

or authority to make settlement since it was Pequeno who had right to settle and Pequeno had the absolute right' to convert which was being unlawfully denied.

On April 1, 2004, District Appellate Court ruled in Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004) that Bankruptcy Court could not deny Pequeno's Ch13 conversion and that it was Pequeno who had standing to settle Judgment as of August 7, 2002 and not Ch7 Trustee Schmidt. District Appellate Court further found that there was 'no fraud' on Pequeno contrary to Ch7 Trustee Schmidt's false allegations of bad faith.

This same ruling of April 1, 2004 thus rendered moot Ch7 Trustee Schmidt's settlement of September 25, 2002.

On March 4, 2005, the 5th Circuit Court of Appeals in cause#04-40573 ruled to affirmed the District Appellate Court's decision of April 1, 2004, cause#03cv029 thus reaffirming the issue that is was Pequeno who had standing to settle Judgment as of August 7, 2002 and not Ch7 Trustee Schmidt.

Now more that 3 years later, same Bankruptcy Court's is attempting to re-affirm same settlement Order of September 25, 2002 which is contrary to Superior Court's decision in Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004) and 5th Circuit cause#04-40573.

Simply, the decision of whether Ch7 Trustee Schmidt had right to settle was rendered 'moot' by superior courts' decision to reverse its earlier denial of Pequeno's Ch13 conversion.

All the courts agreed and stated that the right to settle Pequeno's Judgment was 'totally' dependent on Pequeno's Ch13 conversion.

Ch7 Trustee Schmidt is now attempting for 2nd time to cash-out on Pequeno's judgment by splitting entire judgment between himself, his own hired firm Law office of Michael Schmidt, and other hired law firm of Law Office of Frank Costilla.

Ch7 Trustee Schmidt has again brought false charges Pequeno's Ch13 confirmation. It is important to note that it is not the Ch13 Trustee Cindy Boudloche who recommended re-conversion; it was Ch7 Trustee Schmidt.

Ch7 Trustee Schmidt has been with 'unclean hands' and with conflict of interest, interfering with Pequeno's Ch13 confirmation.

Ch7 Trustee Schmidt has been given free reins to do harm to Pequeno's estate and creditors.

Eventhough Pequeno filed 100% payment plan and included Pequeno's settlement to pay all creditors, unbelievably the Bankruptcy Court, the Honorable Judge Richard Schmidt ruled that it would be the best interest for creditors, for the Court to re-convert Pequeno to Ch7, and then Court proceeded to turn case over to Ch7 Trustee Michael Schmidt.

This appeal has now been scheduled for briefing by the 5th Circuit, appeal#07-40721, Pequeno's wrongful reconversion from Ch13 to Ch7.

It is very important to note that no creditors were ever paid by Ch7 Trustee Schmidt and Ch7 Trustee Schmidt's real intentions from the beginning were for 'no' creditors to get paid since Ch7 Trustee Schmidt failed to inform creditors by stating that informing the creditors was not his responsibility to the Court.

The applicable filing dates establishing the timeliness of the appeal for review are as follows: the Honorable U.S. District Appellate Judge's Final order was entered on December 28, 2006 and Pequeno timely filed Notice of Appeal on January 29, 2007.

On August 28, 2007, 5th Circuit Court of Appeals has now ruled to grant Ch7 Trustee Schmidt's Motion to dismiss Pequeno's appeal.

Pequeno timely filed Petition for re-hearing to the 5th Circuit court of appeals and which has now been denied.

SUMMARY AND REASONS FOR WRIT

Simply, the decision of whether Ch7 Trustee Schmidt had the right to settle Pequeno's Judgment was rendered 'moot' by superior federal appellate courts' decision to reverse its earlier denial of Pequeno's Ch13 conversion. This issue was decided by the Bankruptcy Appellate Court for Southern District of Brownsville in Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex 2004). Therefore, Bankruptcy Court and Trustee Schmidt are barred by the 'law of case doctrine' from using the previously decided issue of who had the right to settle Pequeno's Judgment as of August 7, 2002, and conflicts with the U. S. Supreme Court decisions and other Circuit of Appeals.

Clearly, the record on appeal states that Pequeno was the only party who could settle Pequeno's Judgment because Bankruptcy court did not have authority to deny Pequeno Ch13 conversion pursuant to Title 11 §706(a) since no alleged 'bad faith' was found.

The Honorable Judge Andrew Hanen from the Bankruptcy Appellate Court stated in his Pre-Trial Conference of September 3, 2003, that the right to settle was totally dependent on Pequeno's Ch13 conversion:

"THE COURT: Let me – I'm going to start with Mr. Schell, but

I - Let me crystallize the issues in my own mind.

The first issue I see is whether Mr. Pequeno has an automatic right to convert, and that's the issue I'd like you to address first. The second issue I'd like you to address is the character of funds; you know, whether they're exempt property or not. And then the third issue – and maybe there's a fourth issue that goes along with it, but basically I characterize the other complaints as was there a right to settle. I mean, did the bankruptcy judge have a right to give the trustee the permission to settle the matter and pursue the settlement? That's my way of looking at the issues. Am I missing another issue? Now, I'm kind of lumping all the settlement issues in that last category.

MR. SCHELL: Your Honor, if I may – and I guess I need to approach the lecturn here. If I may, I think that those really are the key issues, the first two, I think being pretty much dispositive of everything else that's before the court.

THE COURT: And that's the way I looked at it as well. before you start, Mr. Schmidt, do you agree with that characterization.

MR. SCHMIDT: Your Honor, Mike Schmidt, I do, Your Honor. I think that's the correct issues in the case."

In the same Pre-Trial Conference, the Honorable Judge Hanen further clarifies the effects of reversing Bankruptcy court's denial of Ch13 conversion:

"THE COURT: Let me ask you. And, Mr. Schmidt, you're welcome to chime in on this. As far as the actual effect of this, if everything stays like the bankruptcy court orders it, the lawsuit get settled and, Mr. Schmidt, you've got 50-cents on the dollar to go out and try to soothe the creditors, Mr. Pequeno is discharged from those debts. If it gets reversed, the big issue here is the right to settle the lawsuit right? I mean, that's really what we're talking about?

MR. SCHELL: Yes, the right to settle and/or not settle the lawsuit.

THE COURT: And, of course, that – with that goes the amount which was settled, because I'm sure there's some amount which Mr. Pequeno would say, sure, they're going to pay me this great."

On March 4, 2005, the 5th Circuit Court of Appeals in cause#04-40573 ruled to affirmed the District Appellate Court's decision of April 1, 2004, cause#03cv029 thus reaffirming the issue that is was Pequeno who had standing to settle Judgment as of August 7, 2002 and not Ch7 Trustee Schmidt.

Now more that 3 years later, same Bankruptcy Court's is attempting to re-affirm same settlement Order of September 25, 2002 which is contrary to Superior Court's decision in Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004) and 5th Circuit cause#04-40573 in violation of the 'law of the case' doctrine.

Pequeno would further show that Ch7 Trustee Schmidt has continued to wrongfully interfere with Pequeno's Ch13 confirmation, (see 5th Circuit appeal#07-40721). Ch7 Trustee Schmidt has not distributed Pequeno's funds since such transaction is 'invalid'. It is barred by 'law of case doctrine' and is illegal. Bankruptcy Court's ruling goes against superior court's ruling.

Further, this appeal is not 'moot' since 5th Circuit can provide judicial relief: appeal involves same parties, transaction to distribute funds is invalid and contrary to 'law of case doctrine'.

Also, Pequeno cites several 5th Circuit cases in support of 'law of the case doctrine', such as *U.S. v. Todd, 920, F.2d 399, 403 (6th Cir. 1990) (citing) Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988)).*

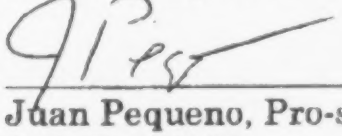
"Where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Zdanok v. Glidden Company-Dunkee Famous Foods Div., 327 F.2d 944, 953 (2d Cir.) cert. denied, 377 U.S. 934, 84 S.Ct. 1338, and Antonioli v. Lehigh Coal & Navigation Co., 451 F.2d 1171, 1178 (3d Cir. 1971); 1B Moore's Federal Practice.* Also cited is *Fontainebleau Hotel Corp v. Crossman, 286, F2.2d 926 (5th Cir. 1961) and Lyons v Fisher, 888, F.2d 1071, (5th Cir. 1989).*

CONCLUSION

Pequeno respectivefully requests for Petition for Writ since these rulings are contrary to the U. S. Supreme Court and other Circuit Court of Appeals rulings.

The petition for a writ of certiorari should be respectivefully granted.

Respectfully submitted,



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December 25, 2007

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-40113

[Filed 9/25/2007]

In The Matter of: JUAN PEQUENO

Debtor

JUAN PEQUENO

Appellant

v.

MICHAEL B SCHMIDT

Appellee

Appeal from the United States District Court for the Southern District of Texas, Brownsville

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ON PETITION FOR REHEARING EN BANC

(Opinion August 28, 2007, 5 Cir., ____, _____F. 3d _____) Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is Denied. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is Denied. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Circ. R. 35), Petition for Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

/s/_BARKSDALE_____
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-40113
Summary Calendar
[Filed 8/28/2007]

In the Matter of: JUAN PEQUENO,

Debtor.

JUAN PEQUENO

Appellant,

versus

MICHAEL B. SCHMIDT,

Appellee.

Appeal from the United Status District Court for the Southern District of Texas
(1:05-CV-271)

Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Juan Pequeno challenges, pro se, the district court's upholding a Chapter 7 bankruptcy settlement entered by his Trustee, Michael Schmidt. On the same day Schmidt filed his appellee brief, he moved separately to dismiss due to mootness.

'Many courts, including our own... have employed the concept of 'mootness' to address equitable concerns unique to bankruptcy proceedings'. Matter of Manges, 29 F.3d 1034, 1038 (5th Cir. 1994). In that regard, mootness 'is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in [bankruptcy] actions'. Id at 1038-39. This 'test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting him'. Id. At 1039 (quoting First Union Real Estate Equity and Mort. Inv. v. Club Assoc., 956, F.2d 1065, 1069 (11th Cir. 1992)).

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

Pequeno contests the district court's December 2006 affirmance of the bankruptcy court's September 2002 approval of a settlement between Schmidt, Pequeno's Chapter 7 Trustee, and the City of Brownsville, successfully sued by Pequeno pursuant to 42 U.S.C. § 1983. Pequeno contends Schmidt should not have been his Chapter 7 Trustee, because Pequeno moved to convert his Chapter 7 proceeding to Chapter 13. His motion to convert, however, was denied. More importantly for determining mootness, Pequeno never moved to stay the settlement entered by Schmidt and the City of Brownsville. Nor did he ever request a bond or otherwise act to prevent consummation of the settlement.

That has occurred. The funds from Pequeno's judgment against Brownsville have been paid to the Trustee, who disbursed them, together with other bankruptcy-estate funds, to creditors.

Schmidt has acted irreversibly, relying on the settlement. To allow Pequeno, who never sought a stay, to attack the settlement's basis would be inequitable. In re Morningside Mobile Home RV Park, 32 Fed. App'x 130, at *2 (5th Cir. 2002). Therefore, the motion to dismiss is GRANTED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
-BROWNSVILLE DIVISION-

[Filed 12/28/06]

JUAN PEQUENO	§	
	§	
Appellant,	§	Civil No. B-05-271
	§	
v.	§	
	§	
MICHAEL B. SCHMIDT,	§	
TRUSTEE	§	
Appellee.	§	

ORDER

Appellant, Juan Pequeno ('Pequeno'), appeals the bankruptcy court's 'Order Denying Debtor's Motion to Null and Void Chapter 7 Trustee Michael B. Schmidt's Settlement of September 16, 2002.' [Bankr. Docket No. 365]

I. Introduction

The instant appeal concerns Chapter 7 Trustee Michael B. Schmidt's ('Trustee' or 'Schmidt') settlement of a lawsuit after Pequeno obtained a judgment against the City of Brownsville. Pequeno argues that the settlement was improper because the Trustee did not have the authority to settle.

Although at times it is difficult to synthesize Pequeno's arguments, he seems to be saying that the settlement was improper because: (1) he was actually in Chapter 13 when the settlement was approved on September 26, 2002; (2) even if he was not a Chapter 13 debtor on September 26, 2002, this Court's order in Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004), mooted the settlement; and (3) because he was briefly converted to Chapter 13 in July of 2004 [Bankr. Docket No. 180], the settlement cannot be adopted anew by the bankruptcy court's order of September 26, 2005. [Bankr. Docket No. 365] The Court rejects each of these arguments as they are factually inaccurate and Pequeno has not provided adequate authority for the legal conclusions he proposes. Each of Pequeno's arguments are addressed in turn below.

II. Analysis

1. Pequeno was Not a Chapter 13 Debtor at the Time the Settlement was Approved

In his brief, Pequeno explains that the bankruptcy court's denial of his motion to 'null and void' the settlement was error because '[t]he issue of the 'right to settle' Pequeno's Judgment depended on whether Pequeno was a Ch13 debtor.' [Docket No. 9] On December 31, 2001 Pequeno filed a voluntary bankruptcy petition under Chapter 7 of the Bankruptcy Code. [Bankr. Docket No. 1] Pequeno filed a motion to convert to Chapter 13 on July 18, 2002, explaining that he erroneously filed a Chapter 7 petition to stop the foreclosure on his home.

[Bankr. Docket No. 50] The bankruptcy court denied Pequeno's motion to convert on November 11, 2002, stating that conversion to Chapter 13 would prejudice the creditors as Pequeno 'acted in bad faith...evidencing an intent to evade Creditors and the Trustee.' [Bankr. Docket No. 121] On September 25, 2002, while Pequeno's motion to convert was pending, the bankruptcy court approved the settlement agreement Trustee Schmidt made with the City of Brownsville in Pequeno's lawsuit. [Bankr. Docket No. 75] Therefore, it appears Pequeno was not a Chapter 13 debtor at the time the settlement was approved.

Pequeno, however advances two arguments to support his claim to be a Chapter 13 debtor on the date the settlement was approved: (A) that the mere act of filing a motion to convert actually converted him to a Ch13 and (B) that he was converted to Chapter 13 on August 7, 2002, 'as evidenced in the Bankruptcy Docket.' [Docket No. 9] (citing Cable v. Ivy Tech State College, 200 F.3d 467 (7th Cir. 1999); In re Pisczek, 269 B.R. 641 (E.D. Mich. 2001); In re Wells, 87 B.R. 732 (N. D. Ga. 1988)).[1] Each of these arguments is rejected for the reasons recited below.

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1 It appears that Pequeno cites these cases for the proposition that a Chapter 7 trustee loses jurisdiction once a case has been converted to Chapter 13. Cable, 200 F.3d at 474 ('At the moment the bankruptcy court granted Cable's motion to convert, the

A. *Filing a Motion to Convert*

Although Bankruptcy Rule 1017 allows a Chapter 13 debtor to convert by simply filing notice, [2] a Chapter 7 debtor seeking to convert to Chapter 13 must file a motion as required by Rule 9013. Bankr. R. 1017(f)(2). Rule 9013 provides that '[a] request for an order. . . shall be by written motion.' Therefore, there was no conversion on July 18, 2002, as Pequeno's motion was merely a 'request for an order.' A Chapter 7 debtor cannot be converted to Chapter 13 until the an order has been entered. See, e.g. In re Dipalma, 94 B.R. 546, 549 (N.D. Ill. 1988) ('The rule makers certainly intended that conversion of a chapter 7 case be accomplished by the entry of an order, not the mere service of notice of intent to request such an order.').

Chapter 7 trustee lost jurisdiction over the case.'); Wells, 87 B.R. at 736 (noting that the Chapter 7 trustee's services were terminated once the case converted and 'upon conversion of a Chapter 7 case to Chapter 13, services rendered after conversion...are not compensable'). However, the Court is confused as to Pequeno's reasons for citing Pisczek, which states, inter alia, that a debtor remains in Chapter 7 until the court rules on a conversion motion. 269 B.R. at 643. Because Pequeno neither quotes nor provides pinpoint cites for the cases which he cites, its is difficult to determine which aspect of the case he is attempting to point out to the Court.

2 'A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under &&1208(a) or 1307(a). The filing date of the notice becomes the date of the conversion order for the purposes of applying &348(c) and Rule 1019.' Bankr. R. 1017(f)(3).

B. *The Bankruptcy Court's Statements at the August 7, 2002 hearing*

The following exchange occurred between counsel for one of the creditors and the bankruptcy court on August 7, 2002:

THE COURT: I mean, the mere fact that we convert to 13 doesn't give him absolutely that right. I mean, he's going to have to get a good plan. He's going to have to convince me that it's the right thing to do.

MR. ANDARZA: Sure.

THE COURT: But I don't see any reason why we couldn't convert to 13 if he wants to try to pay his creditors. So the case will be converted to 13.

[Docket No. 7, Part 3] Although Pequeno argues that the above exchange actually converted him to Chapter 13, the language at best displays an intent to do so at some time in the future. Further, Schmidt points out that the subject matter of the hearing was a Motion to Lift Stay filed by another creditor. [Docket No. 10] At the time of the hearing Schmidt had already filed his objections to the conversion and 'had every reason to believe that the issue of conversion would be considered separately by

the Court, after notice and hearing.'[3] Id. In fact, the bankruptcy court held a hearing on Pequeno's Motion to Convert on October 9, 2002, and subsequently denied his motion. [Bankr. Docket No. 121] Thus, Pequeno was not converted to Chapter 13 on August 7, 2002, as he contends.

2. The Settlement was Not 'Mooted' by this Court

Pequeno's argument that this Court 'mooted' the bankruptcy court's September 25, 2002 approval of the settlement is factually inaccurate. This Court's order of March 31, 2004, addressed four issues: (1) whether Pequeno could convert to Chapter 13, (2) whether the lawsuit was an asset exempt from the bankruptcy estate, (3) whether Trustee Schmidt was authorized to settle Pequeno's lawsuit against the City of Brownsville, and (4) whether the bankruptcy court erred in approving the settlement agreement of September 25, 2002. Although the Court addressed the conversion and whether the lawsuit was exempt, the Court did not reach the last two issues, noting:

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3 The bankruptcy court seems to agree with Schmidt, explaining in the denial of Pequeno's motion to null and void the settlement that:

> On August 7, 2002, a hearing was held on the Debtor's Motion to Reconsider Aurora Loan Service's Motion to Lift Stay. At that hearing the Court made the statement that this case 'will be converted to Chapter 13.' The trustee was not present at the hearing and the Motion to convert was not set that day. No written order of conversion was entered. [Bankr. Docket No. 365]

"Also raised are two points concerning the right of the Trustee to compromise a lawsuit in which Pequeno had prevailed in the District Court and which is being appealed to the Fifth Circuit Court of Appeals. These issues are totally dependent upon the answers to two of the issues described in the text and, as such, need not be ruled upon in this appeal. This court does, however, find it necessary to rule on the characterization of the property, as it is essential to any final resolution of this case."

Pequeno v. Schmidt, 307 B.R. at 570 n.1. Thus, the Court never reached the validity of the bankruptcy court's order regarding the settlement of Pequeno's lawsuit. Pequeno mischaracterizes this Court's holding by stating that the settlement was 'mooted.'

3. *The Bankruptcy Court Reaffirmed the Settlement Agreement on September 26, 2005*

In denying Pequeno's motion to null and void the settlement agreement, the bankruptcy court explained that similar motions had been denied in the past and that Pequeno's motion should be denied because he was a Chapter 7 debtor at the time the settlement was approved.[4] [Bankr. Docket No. 365] Thus, the bankruptcy court's order acts as a reaffirmance of its previous order approving of the settlement. While there was no reason to believe the

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4 Pequeno originally filed for bankruptcy as a Chapter 7 debtor and his motion to convert to Chapter 13 was not ruled on by the bankruptcy court until November 11, 2002, at which time it was denied. Therefore, he was clearly a Chapter 7 debtor when the settlement was originally approved on September 26, 2002.

bankruptcy court' prior approval had been vacated, this order makes clear that it had not. The court's order of September 26, 2005, is no different than the original order approving the settlement of Pequeno's lawsuit in that regard. Pequeno seemingly argues that because he was in Chapter 13 bankruptcy for a brief period of time the settlement is somehow invalid. However, Pequeno offers no authority for this proposition and the Court sees no reason why the settlement should not be honored.

III. Conclusion

'Fact findings of the bankruptcy court are reviewed under a clearly erroneous standard and issues of law are reviewed de novo.' In re SGSM Acquisition Co., LLC, 439 F.3d 233,238-39 (5th Cir. 2006). Pequeno has made no showing of error in this case, be it factual or legal. Accordingly, the order of the bankruptcy court [Bankr. Docket No. 365] is AFFIRMED and all pending motions are DENIED as moot.

Signed this 28th day of December, 2006.

/s/ Andrew S. Hanen
United States District Judge

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
-BROWNSVILLE DIVISION-

[Filed 9/25/06]

IN RE:		
JUAN PEQUENO	§	
	§	
Debtor(s),	§	Civil No. 01-24255
	§	
	§	CHAPTER 7
	§	

ORDER DENYING MOTION TO NULL AND VOID CHAPTER 7 TRUSTEE MICHAEL'S SCHMIDT'S SETTLEMENT OF SEPTEMBER 16, 2002

On this day came on for consideration the Motion to Null and void Chapter 7 Trustee Michael Schmidt's Settlement of September 16, 2002, filed by the Debtor, Juan Pequeno (the 'Debtor'). The Court, having heard the evidence and arguments of counsel and of the Debtor, pro se, and having reviewed the record and transcripts in this case, finds that the Motion should be denied.

The Debtor filed a Motion to convert this case from chapter 7 to chapter 13 on July 18, 2002. Michael Schmidt, the chapter 7 trustee (the

'Trustee') objected on July 22, 2002. On August 7, 2002, a hearing was held on the Debtor's Motion to Reconsider Aurora Loan Service's Motion to Lift Stay. At the hearing the Court made the statement that this case ' will be converted to Chapter 13.' The Trustee was not present at the hearing and the Motion to convert was not set that day. No written order of conversion was entered.

A hearing on the Debtor's Motion to Convert was held on October 9, 2002, and the Court took the matter under advisement. On November 12, 2002, this Court entered an order denying the Motion to Convert. The Debtor appealed the November 12, 2002, order denying conversion and the United States District Court ultimately reversed this Court's ruling on April 1, 2004. No stay pending appeal was ever issued, however, and the case remained a Chapter 7 until the District Court's order was entered.

The settlement which Debtor asks the court to declare 'null and void' was entered at a mediation held on September 16, 2002. The Court finds that Debtor's case was a chapter 7 proceeding at the time and the Trustee had authority to enter into the settlement. Moreover, this Court entered orders on November 12, 2002, denying the Debtor's Motion to vacate Trustee's Agreed Order Approving Settlement Agreement (docket#119), and denying the Debtor's Motion to Vacate Order Authorizing Trustee to mediate and Settle (docket#120). Debtor did not appeal either of the orders and they are now final.

For the foregoing reasons, the Court finds that the Motion to Null and Void Chapter 7 Trustee Michael Schmidt's Settlement of September 16, 2002 should be denied.

It is therefore ORDERED that Juan Pequeno's Motion to Null and Void Chapter 7 Trustee Michael Schmidt's Settlement of September 16, 2002, is hereby DENIED.

SIGNED 09/26/2005

/s/ Richard Schmidt
United States Bankruptcy Judge.

*note
it was found that Petitioner Juan Pequeno did in fact appeal said above orders which Bankruptcy Court stated otherwise.